

STATE OF MICHIGAN
COURT OF APPEALS

DAVID J. CONRAD, D.D.S., and ROBERTA A.
CONRAD,

UNPUBLISHED
December 12, 2013

Plaintiffs-Appellants,

v

CERTAINTEED CORPORATION,

No. 308705
Saginaw Circuit Court
LC No. 10-008190-AV

Defendant-Appellee.

Before: MURPHY, C.J., and FITZGERALD and BORRELLO, JJ.

PER CURIAM.

Plaintiffs appeal by leave granted the October 6, 2011, circuit court opinion and order reversing a district court judgment for plaintiffs in this action for breach of implied warranty and violation of the Magnuson-Moss Warranty Act, 15 USC 2301 *et seq.*¹ We affirm.

Plaintiffs constructed a house on a 13-acre parcel in rural Saginaw County. Although they state in their brief that plaintiff David Conrad² acted as his own general contractor, the record shows that plaintiffs hired Robert Van Auken and Van Auken Construction to serve as the general contractor on the project. Plaintiff testified that Van Auken obtained the building permit for the construction on July 16, 1993. Plaintiffs visited the ABC Building Surplus store and personally selected Certainteed Independence 30-year shingles after viewing pictorial brochures provided in the store. The brochures indicated that the Independence Shingle was a 30-year shingle. Plaintiffs assumed that this meant that the shingles would last for 30 years, and they paid a higher price for the shingles. Plaintiff did not recall whether the brochures referred to a limited warranty as he did not read the fine print and did not know if the brochure referred to a “SureStart warranty.”³ Plaintiff did not recall ever reviewing or receiving a copy of the warranty

¹ Although plaintiffs’ complaint contained a number of claims, only these claims are at issue in this appeal.

² Use of the term plaintiff refers to David Conrad.

³ According to David Hunt, a field service manager for defendant, defendant’s warranty on the shingles was in conformity with the industry standard. Under the terms of defendant’s SureStart

on the shingles. Plaintiffs informed Van Auken of the choice of shingle and Van Auken placed the order for the shingles. The shingles were delivered to the job site and invoiced to Van Auken. Van Auken contracted with and paid a roofer to install the shingles. Van Auken provided the invoice for the shingles to plaintiff and plaintiff paid ABC Building Surplus directly. The shingles were delivered and installed in 1993. Plaintiff had the same shingles installed on a pole barn in 1994, approximately six months after the shingles were installed on the house.

Plaintiff testified that he first knew something was wrong with the shingles “a little bit before 2004” when he observed small roof granules in his brick work, on his deck, and on his barbeque. He contacted a roofer in 2007 who told him that the shingles had “failed.” Plaintiff sent a written claim form to defendant on July 31, 2007, and was informed that defendant would reimburse him \$2,456 under the limited warranty. Plaintiffs rejected the offer, contending that they were entitled to the full cost of labor and materials for a new roof with no reduction of the previous 13 years of use. Plaintiffs paid \$19,900 to reroof the house in 1999. They also paid approximately \$6,000 to reroof the pole barn.⁴

Plaintiffs filed this action in district court on October 31, 2008, raising claims of breach of express warranty, breach of implied warranty, fraud and misrepresentation, product liability, and violation of the Magnuson-Moss Warranty Act. Defendant alleged in response that the claims were time-barred by the statute of limitations and the so-called “economic loss doctrine.” Defendant sought dismissal on this basis by motion for summary disposition.⁵ In an October 30, 2009, opinion, the trial court partially granted defendant’s motion for summary disposition and dismissed the product liability claim because it was filed after the expiration of the applicable statute of limitations (three years after the date of discovery). The court also dismissed plaintiffs’ consumer protection act claim based upon the expiration of the statute of limitations.

The court denied summary disposition of the claims relevant in this appeal. At the conclusion of a three-day jury trial, the jury found in favor of defendant on the breach of express warranty and fraud and misrepresentation claims. The jury found in favor of plaintiffs on the breach of implied warranty and violation of the Magnuson-Moss Act and awarded damages to plaintiffs in the amount of \$25,000.

Defendant appealed to the circuit court, raising eight issues. The circuit court found that defendant’s statute of limitations arguments were dispositive and therefore only reached two of the issues presented. The circuit court noted that the Supreme Court had adopted the economic loss doctrine in *Neibarger v Universal Cooperatives, Inc*, 439 Mich 512; 486 NW2d 612 (1992),

warranty for the Independence Shingle at the relevant time period, during the first five years defendant would pay the full cost of labor and materials to repair defective shingles or apply new shingles to replace defective shingles. After five years, the limited warranty provided for prorated coverage for materials only.

⁴ Plaintiffs used Tamko 30 year fiberglass shingles. Plaintiff did not know if the warranty on the new shingles was a limited warranty as he did not recall reading the warranty.

⁵ Defendant also sought dismissal on this basis by motion for directed verdict at trial.

holding that where a plaintiff seeks to recover for economic loss caused by a defective product, the exclusive remedy is provided by the Uniform Commercial Code (UCC), including the statute of limitations. While *Neibarger* specifically referred to commercial transactions, *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41; 649 NW2d 783 (2002), held that the economic loss doctrine applied to consumer transactions as well as commercial transactions. The circuit court observed that this decision was confirmed by the Supreme Court's orders in *Davis v Forest River, Inc*, 482 Mich 1123; 760 NW2d 215 (2008) and 485 Mich 941; 774 NW2d 327 (2009). The court found that under Article 2, Section 2-725 of the UCC, codified at MCL 440.2725, the four-year limitations period for plaintiff's breach of implied warranty claim ended between 1997 and 1998, and plaintiffs' action was untimely.⁶ The court also found that the UCC statute of limitations applied to plaintiffs' Magnuson-Moss claim and that it was also time-barred.

Plaintiff argues that the circuit court erred by finding that the statute of limitations barred his breach of implied warranty and Magnuson Moss claims. Whether a cause of action is barred by the applicable statute of limitations involves a question of law that this Court reviews de novo. *Trentadue v Buckler Lawn Sprinkler*, 479 Mich 378, 386; 738 NW2d 664.

Plaintiff's statute of limitations arguments are premised upon findings that the purchase of the shingles constituted a consumer transaction and that consumer transactions are not governed by the UCC. Plaintiffs complain that the circuit court failed to determine whether the purchase of the shingles was a consumer transaction or a commercial transaction.⁷ However, the circuit court did not need to make this determination because the transaction involved a sale of goods and, therefore, the circuit court properly determined that the UCC governed the transaction.

In *Neibarger*, 439 Mich 512, the Court adopted the economic loss doctrine in Michigan. *Neibarger* was a consolidated case involving two underlying suits with similar facts. In both suits, the plaintiffs were the owners-operators of a dairy farm. Each plaintiff purchased a

⁶ MCL 440.2725 provides:

- (1) An action for breach of any contract for sale must be commenced within 4 years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than 1 year but may not extend it.
- (2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.

⁷ Where the shingles were purchased by a general contractor, and invoiced and installed by that contractor (or his sub-contractor), it is difficult to see how this could be considered a consumer transaction.

milking system, and after the passage of some years each plaintiff discovered that the milking system was defective. In both cases, the defendant contended that the suit was governed by the four-year UCC statute of limitations, that the statute began to run on the date the milking systems were delivered, and that the suits were time-barred by the time the plaintiffs had filed their lawsuits. The Court framed the issue as follows:

We granted leave to consider the applicability in these consolidated cases of the “economic loss doctrine,” which bars tort recovery and limits remedies to those available under the Uniform Commercial Code where a claim for damages arises out of the commercial sale of goods and losses incurred are purely economic. If plaintiffs in these cases are limited by the doctrine to a warranty action governed by the UCC and its four-year statute of limitations, which recognizes no discovery rule, their claims are time-barred.

The plaintiffs in *Neibarger* argued that their claims arose under products liability law and were governed by a three-year statute of limitations, which only began to run upon discovery of the defect. In rejecting that argument, the Court quoted from MCL 440.1102 the stated purposes of the UCC:

“The stated purposes of the code are “(a) to simplify, clarify and modernize the law governing commercial transactions; (b) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties; [and] (c) to make uniform the law among the various jurisdictions.”

To achieve these goals, Article 2 of the code governs the relationship between the parties involved in “transactions in goods.” Under Article 2, a sale of goods is accompanied by the implied warranties of merchantability and fitness and an express warranty may be created by negotiation or by the conduct of the seller. Thus, under the code, the purchaser of defective goods may recover the benefit of the bargain (the difference between the value of the goods as delivered and the value the goods would have had had they complied with the warranty as well as incidental and consequential damages in a proper case). An action to recover for breach of warranty under the UCC must be commenced within four years of tender of delivery, regardless of the time of discovery of the breach.

Since the plaintiffs’ claims in each of these cases arose out of a sale of goods governed by the UCC, we must determine whether the consequences of its strict limitation period may be avoided by pleading claims sounding in tort. Where, as here, the claims arise from a commercial transaction in goods and the plaintiff suffers only economic loss, our answer is “no” – such claims are barred by the economic loss doctrine. This position is consistent with a considerable body of law that has developed in this state as well as in other jurisdictions.

The economic loss doctrine, simply stated, provides that “[w]here a purchaser’s expectations in a sale are frustrated because the product he bought is not working properly, his remedy is said to be in contract alone, for he has suffered only “economic losses.” This doctrine hinges on a distinction drawn

between transactions involving the sale of goods for commercial purposes where economic expectations are protected by commercial and contract law, and those involving the sale of defective products to individual consumers who are injured in a manner which has traditionally been remedied by resort to the law of torts. (Footnotes omitted); [*Neibarger*, 439 Mich at 519-521.]

Plaintiffs argue that the economic loss doctrine does not apply to their situation because *Neibarger* speaks of the rule's application to "commercial transactions." They contend that the doctrine applies only to transactions between seasoned business people, and that their situation involves a "consumer transaction" outside the scope of the UCC.

However, in *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 50; 649 NW2d 783 (2002), this Court rejected the plaintiff's argument that the economic loss doctrine applies only to commercial, non-consumer transactions in light of the development of the case law. In that case, the plaintiff purchased a new boat in 1985. Although she alleged that she maintained the boat in accordance with the instructions given in the owner's manual, in 1997 she noticed an area of wood decay. In 1998, the plaintiff obtained a repair estimate exceeding \$38,000, and filed suit in 1999. The plaintiff alleged that she purchased the boat with the legitimate expectation that its useful life would exceed 25 years. Her complaint raised 8 claims, a combination of UCC and non-UCC claims. The trial court dismissed all of the claims by summary disposition, and this Court affirmed. Plaintiffs' argument that this Court's decision was contrary to the Supreme Court's decision in *Neibarger* is misplaced. While *Neibarger* recognized the economic loss doctrine in the context of a commercial transaction, *Neibarger* did not make any ruling about consumer transactions. This Court relied on other Supreme Court cases, *Hart v Ludwig*, 347 Mich 559; 79 NW2d 895 (1956) and *Rinaldo's Const Corp v Michigan Bell Telephone Co*, 454 Mich 65, 67; 559 NW2d 647 (1997), to explicitly extend the economic loss doctrine in *Sherman* to consumer cases.

The propriety of the application of the economic loss doctrine to consumer transactions was also raised in *Davis v Forest River, Inc*, 278 Mich App 76, 90-91; 748 NW2d 887 (2008). In the context of a Magnuson-Moss claim, this Court noted that the economic loss doctrine had been applied to situations involving individual purchases where the parties had some kind of contractual relationship. The Supreme Court issued multiple orders in the case. After initially issuing an order peremptorily reversing this Court's decision, on reconsideration the Supreme Court granted leave to appeal directing the parties to address six issues, including whether the economic loss doctrine and the UCC applied to the consumer's claims for breach of warranty. *Davis*, 483 Mich 985 (2009). The Court subsequently issued a peremptory order vacating this Court's judgment and affirming the trial court for different reasons. *Davis*, 485 Mich 941 (2009). The Court stated that the UCC applied to the breach of warranty action as it involved a sale a goods. The order did not specifically address the economic loss doctrine, and the Court concluded that it was unnecessary to reach the remaining issues argued before the Court. Thus, while the Supreme Court found that the UCC applied, it did not make a declaration regarding the application of the economic loss doctrine. Had the Court found that this Court's extension of the economic loss doctrine to consumer transactions was in violation of *Neibarger, supra*, the Court clearly had the opportunity to correct that error. In any event, where the central issue in this case is the application of the UCC statute of limitations period, the Supreme Court's finding that the

UCC applied to the consumer transaction in *Davis* supports the circuit court's application of the UCC statute of limitations.

Sherman also negates plaintiffs' arguments that the limitation period for the breach of warranty claim should be extended to future performance by MCL 440.2725. *Sherman* involved a similar claim as this case, where the owner's manual referred to years of trouble-free boating. The Court concluded that to trigger application of MCL 440.2725 there must be an explicit extension to future performance. *Sherman*, 251 Mich App at 57. "Accordingly, without an express duration as to the future period, the cause of action accrued at the tender of delivery, and the limitation period expired." *Id.* While the shingles were marketed as "30 year shingles," the jury rejected plaintiff's express warranty claim, and there was no explicit warranty for that term of years.

Plaintiff also correctly contends that, because the Magnuson Moss Act does not specify a period of limitations, courts adjudicating a Magnuson-Moss claim must "borrow" the most analogous statute of limitations from the law of the state in which the court sits. See, e.g., *Zuremba v Marvin Lumber & Cedar Co*, 458 F Supp 2d 545, 551-552 (ND Ohio, 2006). Plaintiff asserts, without citation to authority, that MCL 600.5833 and 5807(8) apply to plaintiff's claims. However, the most analogous and therefore applicable statute of limitations for a Magnuson Moss claim is found in UCC 2-725, as codified in various state statutes. See *Snyder v Boston Whaler, Inc*, 892 F Supp 955, 960 (WD Mich, 1994). Thus, MCL 440.2725 applies to the Magnuson Moss claim and, for the same reasons stated above with regard to the implied warranty claim, the Magnuson Moss claim is also time-barred.

Affirmed.

/s/ William B. Murphy
/s/ E. Thomas Fitzgerald
/s/ Stephen L. Borrello